No. 18-966

# In the Supreme Court of the United States

DEPARTMENT OF COMMERCE, *ET AL.*,
*Petitioners,*

*v.*

NEW YORK, *ET AL.*,
*Respondents.*

**On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR THE KIPP FOUNDATION, ADVOCATES FOR CHILDREN OF NEW YORK, NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE, AND UNIDOSUS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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## TABLE OF CONTENTS

**INTEREST OF AMICI CURIAE** ..... 1

**SUMMARY OF ARGUMENT** ..... 3

**ARGUMENT** ..... 6

I. THE INCLUSION OF A CITIZENSHIP QUESTION WILL CAUSE AN UNDERCOUNT IN IMMIGRANT COMMUNITIES OF COLOR. ..... 6

II. UNDERCOUNTING IMMIGRANT AND LOW-INCOME COMMUNITIES WILL DEEPEN INEQUALITY IN AN ALREADY UNEQUAL PUBLIC EDUCATION SYSTEM. ..... 8

A. An Undercount Will Result in Cuts to Title I Funds. ..... 11

B. An Undercount Will Lead to Decreased Funding for Key Educational Programs at the Core of Our Social Safety Net. ..... 13

III. AN UNDERCOUNT WILL REDUCE FUNDING FOR AN ARRAY OF COMMUNITY RESOURCES THAT ARE VITAL TO THE EDUCATIONAL OUTCOMES AND OVERALL WELLBEING OF CHILDREN OF COLOR. ..... 17

A. Funding for an Array of Health and Human Services Relies on an Accurate Census Count. ..... 18

B. Equitable Economic Development Necessitates an Accurate Census Count. ..... 24

C. An Undercount Will Inhibit Adequate Transportation and Infrastructure Investment.....28

IV. INCLUDING A CITIZENSHIP QUESTION WILL CAUSE CHILDREN OF COLOR TO SUFFER STIGMATIC AND DIGNITARY HARMS.....31

**CONCLUSION**.....37

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## INTEREST OF AMICI CURIAE[1]

The KIPP Foundation is a nonprofit organization whose mission is to help students from educationally underserved communities develop the knowledge, skills, and character needed to lead choice-filled lives. The Foundation supports 224 KIPP schools nationwide in twenty states and Washington, D.C., serving nearly 100,000 students annually. Roughly 95% of KIPP students are Latinx or Black, and 89% qualify for federal free or reduced price lunch. An undercount of these communities in the 2020 census will have a direct impact on KIPP schools' funding—a majority of which comes from states and localities whose funding is tied to census data—and would jeopardize the viability of schools supported by the KIPP Foundation. Furthermore, the KIPP Foundation is concerned about the impact the inclusion of a citizenship question will have on KIPP school students and their communities.

Advocates for Children of New York ("AFC") is a nonprofit organization dedicated exclusively to protecting every child's right to an education, with a particular focus on students from low-income backgrounds. The children and families that AFC serves stand to be disproportionately impacted by the

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[1] The parties have consented to the filing of this brief. Written consent is on file with this Court. No counsel for a named party authored this brief in whole or in part, and no named party or counsel for a named party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

inclusion of a citizenship question on the 2020 census. Of particular concern are immigrant students and English Language Learners. AFC is well-acquainted with the myriad ways in which these populations are already underserved in our education system and fears the further disadvantages that an undercount will create.

The New Jersey Institute for Social Justice is a nonprofit legal advocacy organization whose mission is to topple load-bearing walls of structural inequality to empower just, vibrant, and healthy urban communities. The communities that the Institute serves face some of the starkest racial disparities in America, and as such, are most vulnerable to an undercount in the 2020 census. Therefore, full representation in the 2020 census—which will determine political, financial, and programmatic resources—is essential. The Institute believes that a citizenship question will discourage the most vulnerable from being counted, thereby exacerbating existing underrepresentation and destroying a full 2020 census count.

UnidosUS is the nation's largest Hispanic civil rights and advocacy organization. UnidosUS serves millions of Latinx people across areas including civic engagement, immigration, education, and health services, and envisions an America where economic, political, and social advancement is a reality for all. UnidosUS believes that the citizenship question will impair the health and education of all American children, while also disenfranchising millions across the country and leading to enormous consequences for the Latinx populations that UnidosUS serves.

All *amici* have a vested interest in jurisprudence that protects the rights of children and students. Accordingly, they have a substantial interest in the outcome of this litigation.

## SUMMARY OF ARGUMENT

Our nation's first "undercount" declared, with constitutional imprimatur, that enslaved people would only count as three-fifths a person. The result was not only underrepresentation in Congress, but also the deep and lasting harms that are inherent in being told, quite literally, that you do not count. While that particular scourge on our representative democracy has been condemned to the annals of history, the prospect of yet another undercount looms—and with it, the same consequences of underrepresentation and dignitary injury.

The decision to add a citizenship question to the 2020 census is certain to exacerbate the undercount that already plagues immigrant communities of color.[2] While an undercount will have consequences for a broad cross-section of our society, the impact on

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[2] Although an undercount will impact all hard-to-count communities, *amici* are focused on the impact including a citizenship question on the census would have on immigrant communities of color. The Census Bureau designates particular communities as hard-to-count based on a lower response rate in the previous census. People of color, non-English speakers, undocumented immigrants, and low-income households have all been identified as being at higher risk of being undercounted. Ron Jarmin, *Counting Everyone Once, Only Once and in the Right Place*, U.S. Census Bureau: Director's Blog (Nov. 5, 2018).

children and students, particularly in immigrant communities of color, should be of paramount concern.

An inaccurate census count will result in misallocations of education and community resource funding, therefore harming all students who find themselves, their families, and their communities underrepresented. An undercount of immigrant communities of color will have a direct negative effect on the amount of education funding that is allocated to school districts where such communities reside, resulting in lasting, deleterious consequences for those students' academic outcomes and their ability to lead lives of choice and opportunity. The funding sources and programs that will be affected include Title I, Head Start, and the National School Lunch Program. Underfunding may be realized in myriad ways, including, but not limited to, the hiring of fewer teachers, reduced extracurricular programming, and fewer comprehensive early intervention services. Such reductions will harm all students, but particularly children of color and those from low-income and immigrant families—expanding an already inexcusably wide achievement gap.

Funding for a broad array of vital community resources will also be affected by an undercount of marginalized communities. Numerous programs offered by the United States Department of Health & Human Services—including the Children's Health Insurance Program; the Special Supplemental Nutrition Program for Women, Infants, and Children; the Supplemental Nutrition Assistance Program; and the Child Care and Development Fund—rely on funding mechanisms that are directly tied to census

data. Furthermore, local economic development funds and transportation and infrastructure investment will be diminished for many immigrant communities of color. All of these resources have a direct effect on the health and wellbeing of children and their families. Without these resources, our most vulnerable will suffer.

Finally, the very inclusion of a citizenship question will send the damaging message that immigrants are unworthy of full membership in our communities, inflicting dire harm to their dignity and sense of belonging. Its inclusion, particularly when viewed in the full context of our current political climate, will also cause immigrant children to feel fear, anxiety, a lack of safety, and stress as they worry that they, their family members, or their neighbors are at risk of deportation. Both effects will hinder these children's mental health, with profound consequences for their performance in school and general wellbeing.

The citizenship question will silence and disenfranchise immigrant communities of color in a way that is antithetical to our ideals of representative democracy. This Court has repeatedly found it necessary to right wrongs that gave moral and legal authority to dangerous and painful stereotypes against populations of Americans pushed to society's margins. This case presents an opportunity to prevent outright the same species of stigmatic injury. It is an opportunity that the Court should seize.

## ARGUMENT

### I. THE INCLUSION OF A CITIZENSHIP QUESTION WILL CAUSE AN UNDERCOUNT IN IMMIGRANT COMMUNITIES OF COLOR.

As found by the court below, adding a citizenship question to the 2020 census will "decrease . . . the quality of census data" and cause a severe undercount of noncitizen and Hispanic households, which "will translate into a loss of political power and funds" in communities with high numbers of immigrants. *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 516 (S.D.N.Y. 2019). The court noted that the fact of this undercount is amply supported by the Census Bureau itself, *id.* at 578–80, and found that for noncitizen households, the differential decline in self-responses will be *at least* 5.8%. *Id.* at 583. Indeed, advocates and community leaders are rightfully concerned that citizen and noncitizen immigrants alike will be afraid to respond to the census—particularly in the current political climate, which is characterized by an antipathy toward immigrants. *See, e.g.*, Sarah Pierce & Andrew Selee, Migration Policy Inst., *Policy Brief: Immigration Under Trump: A Review of Policy Shifts in the Year Since the Election* (2017) (detailing the extraordinary nature of the Trump administration's immigration policies); Tania Karas, *Here's Why the US Census Citizenship Question Stokes Mistrust*, PRI (Jan. 18, 2019) (reporting on the fear elicited by a citizenship question, particularly given the political climate).

Further, an undercount caused by the citizenship question will disproportionately impact communities of color. Immigrants are more likely to be people of color. In 2016, non-whites comprised 53.9% of the foreign-born population. Pew Research Ctr., *Characteristics of the U.S. Foreign-born Population: 2016*, at 5 (2018). Communities of color are already undercounted; in the 2010 census, 2.1% of the Black population and 1.5% of the Hispanic population—a total amounting to about 1.5 million people—were not counted, compared to a 0.8% *over*count of the non-Hispanic white population. Press Release, U.S. Census Bureau, *Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census* (May 22, 2012); AP, *2010 Census Missed 1.5 Million Minorities*, CBS News (May 22, 2012, 9:25 PM).

Census data is intimately connected to federal funding for an array of vital programs, including those that fund education, health and welfare, housing, and economic development. Andrew Reamer, George Wash. Inst. of Pub. Policy, *Counting for Dollars 2020 Report #4: Census-Derived Datasets Used to Distribute Federal Funds* 2 (2018). These programs primarily provide essential services for low-income communities. The citizenship question will principally undercount communities with high numbers of immigrants and low-income households, determining how funding is distributed for these vital programs. The citizenship question will therefore compound existing inequalities, as wealthier districts receive a windfall while poorer districts lose essential funding.

This dynamic will especially harm children. They are the direct beneficiaries of many programs that are funded based on census data. Thus, children—particularly children of color and those from immigrant or low-income families—will be disproportionately harmed by the citizenship question, because the undercount that it will produce will divert funding from their communities. Furthermore, disruptions to programs that do not directly support children—but provide services to others in the community, such as their parents—will indirectly harm children, because a child's wellbeing is closely linked to factors such as whether their parents are employed, the economic vitality of the neighborhood in which they live, and access to quality housing. Claudia J. Coulton et al., *Temporal Effects of Distressed Housing on Early Childhood Risk Factors and Kindergarten Readiness*, 68 Child. & Youth Servs. Rev. 59, 69 (2016); Ann Huff Stevens & Jessamyn C. Schaller, *Short-Run Effects of Parental Job Loss on Children's Academic Achievement*, 30 Econ. Educ. Rev. 289, 293–96 (2011).

## II. UNDERCOUNTING IMMIGRANT AND LOW-INCOME COMMUNITIES WILL DEEPEN INEQUALITY IN AN ALREADY UNEQUAL PUBLIC EDUCATION SYSTEM.

The legacy of institutionalized racism and structural inequality is readily apparent in the public education system. Persistent patterns of residential segregation across the country, combined with concentrated poverty and the conscious decisions of elected officials to make education funding dependent on income and property taxes, routinely deny poor

students and students of color access to well-funded, high-quality public schools. As a result, our current education system is merely a different iteration of "separate but equal," a paradigm that characterized the education landscape before *Brown v. Board of Education*, 347 U.S. 483 (1954). Gary Orfield et al., UCLA Civil Rights Project, Brown *at 60: Great Progress, A Long Retreat, and an Uncertain Future* (2014).

The stark inequality that pervades our education system—and the racial gaps in achievement, income, and other socioeconomic indicators that inequality fuels—is the backdrop against which any changes in federal education funding must be evaluated. For example, the achievement gap between Black and white students, as well as between Latinx and white students, is still intolerably high. Sean F. Reardon et al., *Patterns and Trends in Racial/Ethnic and Socioeconomic Academic Achievement Gaps*, in *Handbook of Research in Education Finance and Policy* 491, 503–04 (Helen F. Ladd & Margaret E. Goertz eds., 2d ed. 2015). There are also significant achievement gaps among Asian American and Pacific Islander students. Valerie Ooka Pang et al., *Asian American and Pacific Islander Students: Equity and the Achievement Gap*, 40 Educ. Researcher 378 (2011). The persistence of these racial achievement gaps puts students at a disadvantage for a lifetime. Furthermore, the achievement gap tied to income has ballooned over the past thirty years and is now significantly greater than the racial achievement gaps. Sean F. Reardon, *The Widening Income Achievement Gap*, Educ. Leadership, May 2013, at 10, 11. This income achievement gap is of particular

relevance to immigrant communities of color, given that these communities are often socioeconomically disadvantaged. *See Ethnic and Racial Minorities & Socioeconomic Status*, Am. Psychol. Ass'n, https://www.apa.org/pi/ses/resources/publications/minorities (last visited Mar. 24, 2019) (collecting research showing that "[t]he relationship between SES, race and ethnicity is intimately intertwined").

An undercount on the census will exacerbate these existing inequalities. Because census data forms the basis of formulas used to distribute educational funding, an inaccurate census will lead to a reduction or misallocation of funding for key educational programs designed specifically to address the inequality discussed above. Insufficient or ineffective distribution of funding will deprive children in these communities of a quality education, with lasting negative effects on their educational and socioeconomic outcomes. The undercount stymies communities of color that are already disenfranchised in their efforts to combat the effects of decades of underinvestment and inequality. Any further cuts in education funding to disadvantaged communities caused by the citizenship question will only intensify existing inequality. This Court, recognizing the vital role that education plays in our democracy, has concluded that when states provide the benefit of education to their residents, they must make it available "on equal terms" to undocumented children. *See Plyler v. Doe*, 457 U.S. 202, 223 (1982) (citing *Brown*, 347 U.S. at 493). Any diminution in federal education funding will significantly impair states' ability to comply with this requirement. The following

sections examine the reduction in educational funding that an undercount will yield, which exemplifies the harm that the inclusion of a citizenship question on the census will produce.

### *A. An Undercount Will Result in Cuts to Title I Funds.*

In order to close educational achievement gaps, Title I of the Elementary and Secondary Education Act ("ESEA") provides federal funding to local educational agencies ("LEAs") and schools with a high number or percentage of children from low-income backgrounds. 20 U.S.C. §§ 6301, 6333–6335, 6337 (2018). Title I is the largest federal K–12 program. During the 2015–2016 school year, more than twenty-six million children and 55,000 schools benefited from Title I funds. *Improving Basic Programs Operated by Local Education Agencies (Title I, Part A)*, U.S. Dep't Educ. (Oct. 24, 2018). Because Title I is designed to allocate funding to areas with higher relative and absolute poverty, the formulas used to distribute funding are profoundly susceptible to variations and inaccuracies in census data. *See* William Sonnenberg, Nat'l Ctr. for Educ. Statistics, *Allocating Grants for Title I*, at 3–6 (2016) (describing types of Title I grants and their population-based qualification criteria). Because the citizenship question will disproportionately undercount low-income households, the census data will misallocate Title I funds based on inaccurate levels of relative poverty. This will deprive immigrant communities of color their share of vital Title I funding.

To qualify for Title I funding, LEAs must have at least ten students who are low-income, and that number must be greater than 2% of their five- to seventeen-year-old population. 20 U.S.C. § 6333(b) (2018). The specific amount of Title I funds awarded to each eligible LEA is calculated by adding the totals of four complex formulas that rely on poverty estimates. These estimates are derived from census data on families living at or below the poverty level. If the census undercounts poverty in a specific area, then the area will receive less Title I funding. Because the citizenship question will undercount immigrant communities of color—who disproportionately live in low-income areas—census data showing the rate of poverty in these communities will be artificially low. This will result in communities receiving less Title I funding than they deserve. *Cf.* Sonnenberg, *supra*, at 5–6 (describing how poverty measurements impact Title I eligibility).

The majority of Title I funds are spent on staff and services designed to assist children from low-income families, such as teacher salaries and benefits. U.S. Dep't of Educ., *Study of Title I Schoolwide and Targeted Assistance Programs: Final Report* 11 (2018). Once funding reaches the LEA, the school district allocates Title I funding based on the distribution of low-income children across the area. If a school receives fewer Title I funds because of an undercount, then it will be less able to hire and retain teachers and other professionals in schools with high numbers of immigrants of color than would otherwise be the case. Many students with the greatest needs—such as English language learners and students with disabilities—rely on staff paid with Title I funding.

Schools also use Title I funds to provide vital services, such as supplemental instruction in reading and mathematics, instructional materials, and professional development for teachers. *Id.* at 19–20. An undercount due to the citizenship question will significantly curtail the ability of schools to fund these vital staff and services. Thus, the citizenship question runs contrary to Title I's goal of closing the educational achievement gap for disadvantaged groups.

### *B. An Undercount Will Lead to Decreased Funding for Key Educational Programs at the Core of Our Social Safety Net.*

Head Start and the National School Lunch Program ("NSLP") rely on census data to distribute funding. An undercount will skew funding for these programs and disproportionately impact children who live in immigrant communities of color.

Head Start serves children from birth to age five from low-income families by focusing on school readiness and providing a variety of services including early learning, health, and family wellbeing. Head Start serves a highly disadvantaged population—families who are at or below the federal poverty line. *Poverty Guidelines and Determining Eligibility for Participation in Head Start Programs*, U.S. Dep't of Health & Hum. Servs. (Mar. 20, 2019); *see also* Annual Update of the HHS Poverty Guidelines, 84 Fed. Reg. 1167, 1168 (Feb. 1, 2019) (providing most recent guidelines). Head Start produces both short- and long-term improvements in cognitive and non-cognitive skills that have lifetime consequences for participants'

future educational success, mental and physical health, career earnings, and likelihood of engaging in criminal activity. Sneha Elango et al., *Early Childhood Education*, in 2 *Economics of Means-Tested Transfer Programs in the United States* 235 (Robert A. Moffitt ed., 2016).

Head Start expansion funds, which create new slots for eligible three- and four-year-olds, are allocated to Head Start providers on the basis of American Community Survey ("ACS") data estimating the number of poor children under age five living in a particular state. Cong. Research Serv., RL30952, *Head Start: Background and Funding* 26–27 (2014); George Wash. Inst. of Pub. Policy, *Counting for Dollars 2020 Profile #11: Head Start/Early Head Start* (2017). Because the citizenship question will disproportionately undercount low-income households, the data gathered will underestimate the number of eligible, low-income children, thus the amount of Head Start funding allocated to districts will be erroneously low. *See id.* (explaining that an underestimate of low-income families in the ACS would lead to less funding for Head Start). As such, the undercount will result in low-income, immigrant communities of color not receiving their fair share of federal Head Start funding for the next ten years.

Head Start is a vitally important program for children of immigrant families. Early childhood education cultivates the development of language skills, provides resources for children who have experienced trauma, and helps families access and navigate crucial social services. Samuel A. Stephens, *Access to Early Care and Education for Children in*

*Immigrant Families: Research-to-Policy Resources* (2017). Despite this, children of immigrant families are less likely than children from non-immigrant families to be enrolled in early education programs. They and their families face unique difficulties in accessing these programs—ranging from eligibility issues, language barriers, and reticence to interact with government agencies for fear of immigration enforcement. *Id.* The demographic makeup of Head Start reveals that immigrant communities of color will be unduly impacted by any diminishment of Head Start funding: 37% of Head Start participants are Hispanic or Latino, 29% are Black, 29% come from families that speak a language other than English at home, and 23% come from families that speak Spanish at home. U.S. Dep't of Health & Human Servs., *Head Start Program Facts: Fiscal Year 2017* (2018).

The NSLP provides a lifeline to children who face food insecurity by subsidizing school lunches. Students whose families are at or below 130% of the federal poverty line are eligible to receive free lunches and children whose families fall between 130% and 185% of the federal poverty line are eligible to receive reduced-price lunches. Child Nutrition Programs: Income Eligibility Guidelines, 83 Fed. Reg. 20,788–89 (May 8, 2018). Free- and reduced-price lunches lower the incidence of food insecurity by 3.8%, and families who have at least one child enrolled in the NSLP experience a 14% reduction in their risk of food insecurity. Food Research & Action Ctr., *The Role of the Federal Child Nutrition Programs in Improving Health and Well-Being* 3 (2017). The consequences of food insecurity are extensive and wide-ranging and can impair nearly every aspect of a child's physical

and mental health, as well as their cognitive and social-emotional development. *Id.* at 2.

The NSLP also plays a vital role in preventing poor nutrition among participants by reducing the rate of poor health by at least 29%. *Id.* at 5. Participants in the NSLP are less likely to have nutritional deficiencies. *Id.* at 4. Much like food insecurity, the list of adverse health impacts that result from poor nutrition is expansive and includes conditions that may be irreversible. *Id.* at 2–3.

Funding for the NSLP is tied to two census-derived data sources which are used to determine eligibility for enrollment in the program: the Poverty Guidelines and the Consumer Price Index for Urban Consumers. 42 U.S.C. § 1758(b)(1)(A)–(B) (2018); 7 C.F.R. § 210.4(b)(1)(iii) (2012). An undercount could distort the calculation of these two crucial measures, which are both set based on national statistics about family income gathered through the census. Because populations that will be undercounted tend to be disproportionately low-income, the data will likely erroneously inflate the Consumer Price Index, which will cause the rate used to reimburse schools for food to go down. Counting fewer low-income people could also adjust the Poverty Guidelines upwards, making it more difficult for families to qualify for NSLP. George Wash. Inst. of Pub. Policy, *Counting for Dollars 2020 Profile #7: National School Lunch Program* (2017).

Communities of color will be particularly hard hit by any changes to NSLP funding resulting from an undercount. For example, in 2009, 48% of all public

school fourth graders, and 29% of white public school fourth graders, were eligible for free- or reduced-price lunches, compared to 77% of Hispanic fourth graders. U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, NCES 2010-015, *Status and Trends in the Education of Racial and Ethnic Minorities* 36 (2010).

In a country where over 40% of children live near the poverty line, the NSLP is absolutely indispensable. Even seemingly marginal impacts on the census-derived eligibility criteria or reimbursement rates for a program that offers many students their one warm meal of the day would produce damaging ripple effects.

## III. AN UNDERCOUNT WILL REDUCE FUNDING FOR AN ARRAY OF COMMUNITY RESOURCES THAT ARE VITAL TO THE EDUCATIONAL OUTCOMES AND OVERALL WELLBEING OF CHILDREN OF COLOR.

The undercount caused by including a citizenship question on the census will circumscribe a broad array of community resources available to children across the country. An undercount will both diminish and unfairly reshape resource allocation for health and human services, economic development, and transportation. Directly and indirectly, each alteration impacts the quality of life for children, particularly within immigrant communities of color. The programs and grants discussed below represent a snapshot of those that would be impacted by an undercount.

### *A. Funding for an Array of Health and Human Services Relies on an Accurate Census Count.*

An inaccurate census will lead to a reduction in or misallocation of funding available for an array of social services, as census data is used in calculations across funding formulas. Insufficient or ineffective distribution of funds will hinder necessary health programs serving families in need, with lasting negative effects on children's educational, socioeconomic, and overall health outcomes.

Two examples of healthcare programs at risk if a citizenship question is included in the census are the Children's Health Insurance Program ("CHIP") and the Health Center Program ("HCP"). Under CHIP, states design their own child-centered benefits programs; thus, benefits vary by state. *Benefits*, Medicaid.gov, https://www.medicaid.gov/chip/benefits/index.html (last visited Mar. 24, 2019). HCP is a network of nearly 1,400 health centers providing affordable and accessible primary care to one in nine children aged seventeen years or younger. *Health Center Program: Impact and Growth*, Health Res. & Servs. Admin. (Dec. 2018), https://bphc.hrsa.gov/about/healthcenterprogram/index.html.

A census undercount of the number of children in poverty in any given state would increase the likelihood of an underestimate of such children in the Census Bureau's Annual Social and Economic Supplement of the Current Population Survey ("CPS ASEC"). CHIP, a capped program, allocates an annual

share to states using a formula that primarily relies on CPS ASEC data. Thus, the undercount of low-income communities resulting from the inclusion of a citizenship question would lead to an underestimate of the number of children living in poverty in a state, as recorded by the CPS ASEC. This, in turn, would lead to relatively less CHIP funding to those states most impacted by an undercount. George Wash. Inst. of Pub. Policy, *Counting for Dollars 2020 Profile #9: State Children's Health Insurance Program (S-CHIP)* (2017).

The Health Resources and Services Administration ("HRSA"), which runs the HCP, relies on an accurate census count to identify areas as "underserved," a prerequisite for HCP qualification. An undercount will increase the likelihood that areas that should qualify to receive HCP services will not. George Wash. Inst. of Pub. Policy, *Counting for Dollars 2020 Profile #14: Health Center Programs (Community, Migrant, Homeless, Public Housing)* (2017).

The repercussions for families are staggering. CHIP makes a difference in children's lives by ensuring that children from low-income backgrounds receive essential healthcare. Between 1997 and 2015, CHIP cut the number of uninsured children in the United States by more than half, providing millions of newly insured children access to benefits such as routine check-ups, immunizations, doctor's visits, and vital medication. Lisa Shapiro, *The Children's Health Insurance Program: Why CHIP Is Still the Best Deal for Kids* 1 (2016) (finding that in 2015, there were 4.1 million uninsured children—down from 10.7 million

in 1997). Unsurprisingly, access to health insurance has been linked to short-term gains in the wellbeing of children from low-income homes as well as long-term improvements to their educational, economic, and social-emotional outcomes—all of which increase children's likelihood of living happy lives and achieving intergenerational mobility. Sarah Cohodes et al., *The Effect of Child Health Insurance Access on Schooling: Evidence from Public Insurance Expansions* 51 J. Hum. Resources 727, 755–56 (2016). Additionally, adults with access to primary healthcare are better equipped to provide responsive and stable care to children during their earliest years, positively influencing lifelong outcomes in health, learning, and behavior. *See* Harvard Univ., Ctr. on the Developing Child, *The Foundations of Lifelong Health Are Built in Early Childhood* 11–12 (2010) (explaining that children's long-term health is improved by having responsive and capable caregivers).

An undercount will cause an improper allocation of resources for two major nutrition programs: the Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC") and the Supplemental Nutrition Assistance Program ("SNAP"). Through WIC, state health departments across the nation distribute federal funds to health and welfare agencies that provide children with sound nutrition during critical periods of cognitive development. *Women, Infants, and Children (WIC)*, U.S. Dep't Agric. Food & Nutrition Serv. (Oct. 17, 2018). Through SNAP, millions of low-income children and families receive nutritional and economic assistance. *Supplemental Nutrition Assistance*

*Program (SNAP)*, U.S. Dep't Agric. Food & Nutrition Serv. (Apr. 25, 2018).

Funding for WIC is calculated and distributed based on the state's relative share of infants and children (ages zero to four) living at or under 185% of the poverty line and deemed at nutritional risk. 7 C.F.R. § 246.16 (2014). This data is derived from the ACS, which is designed to match the Census Bureau's annual population estimates by age, sex, and race. *Differences Between the ACS and Decennial Census*, PRB (Apr. 13, 2009). An undercount of low-income and immigrant communities will result in artificially low estimates of infants and young children living in low-income households in these communities, which could cause reduced allocations of WIC funding to states that need it. George Wash. Inst. of Pub. Policy, *Counting for Dollars 2020 Profile #12: Supplemental Nutrition Program for Women, Infants, Children (WIC)* (2017).

Similarly, federal funding for SNAP waivers is distributed based on census-derived data. Therefore, an undercount of immigrant and low-income communities will result in these communities getting less than their fair share of federal funding. *See* George Wash. Inst. of Pub. Policy, *Counting for Dollars 2020 Profile #2: Supplemental Nutrition Assistance Program (SNAP)* (2017) ("A local Decennial Census miscount would increase the likelihood of a less accurate estimate of local employment, which could affect an area's eligibility to receive a waiver.").

Inaccurate WIC and SNAP funding will directly impact low-income students. For example, children

whose mothers participated in WIC while pregnant scored higher on assessments of mental development at age two than similarly situated children whose mothers did not participate—a difference that research demonstrates lasts into the school years and adulthood. Ctr. on Budget & Policy Priorities, *WIC Improves Children's Educational Prospects* (2015). An undercount would also have devastating effects on the millions of low-income individuals who rely on SNAP to survive. SNAP participation is directly correlated with improvements in reading and mathematics skills, increased high school graduation rates, and improved adult health outcomes. Children receiving SNAP are less likely than low-income non-participants to be in poor health or underweight, and access to nutritious foods during early childhood is closely tied to greater academic skills, including improved memory, emotional stability, and social skills, as well as overall improved health. Steven Carlson et al., Ctr. on Budget & Policy Priorities, *SNAP Works for America's Children* 2, 16–17 (2016).

Two public benefits programs that will also be negatively impacted by an undercount are the Social Services Block Grant ("SSBG") Program and the Child Care and Development Fund ("CCDF"). SSBGs are allocated to states according to the relative size of each state's population, as determined by the census. A flexible funding source, SSBGs empower states to tailor social service programming to their population's needs, enabling them to provide an array of essential social services that promote family self-sufficiency and protect children from neglect, abuse, and exploitation. *Social Services Block Grant Program (SSBG)*, U.S. Dep't Health & Hum. Servs. Off.

Community Servs. (last visited Mar. 24, 2019). States use SSBG funding for programs such as child protective services, foster care, and daycare services. U.S. Dep't of Health & Human Servs., Office of Cmty. Servs., *SSBG Fact Sheet* 1–2 (2018).

The CCDF is a block grant that helps families pay for childcare. It is allocated to states according to relative population size, as determined by census data. Thus, states with larger low-income, immigrant, and undocumented migrant populations are at risk of receiving artificially reduced funding as a result of an undercount. Such disproportionate allocations will have wide-ranging consequences for children. For example, parents—particularly mothers—are more likely to leave or lose employment and less likely to start new jobs when the cost of childcare is high. Sarah Jane Glynn et al., Ctr. for Am. Progress, *The Importance of Preschool and Child Care for Working Mothers* 5–6 (2013). Beyond the obvious financial effects, the limited availability of convenient, affordable, high-quality early care options—particularly for parents whose economic security depends on multiple low-wage jobs, and whose children have chronic health challenges—can give rise to circumstances in which young children are exposed to excessive stress, with potentially irreversible effects on lifelong health and wellbeing. Nat'l Sci. Council on the Developing Child, *Excessive Stress Disrupts the Architecture of the Developing Brain*, 9 J. Child. Servs. 143, 148 (2014).

Additionally, an undercount will undermine the financial stability of families through distribution of federal reimbursements for state expenditures on

Medicare and other medical and social service programs. The reimbursement rate, called the Federal Medical Assistance Percentage ("FMAP"), depends on the average per capita income of each state relative to the national average, as determined by census data. *Federal Medical Assistance Percentage (FMAP) for Medicaid and Multiplier*, Henry J. Kaiser Family Found. (last visited Mar. 24, 2019). As established previously, states with larger low-income, immigrant, and undocumented migrant populations will be disproportionately impacted by a citizenship question on the census. An undercount of state populations would in turn skew per capita income upward and result in a lower federal reimbursement rate to that state. Andrew Reamer, George Wash. Inst. of Pub. Policy, *Counting for Dollars 2020 Report #2: Estimating Fiscal Costs of a Census Undercount to States* 2–5 (2018).

The impact on children and families of a statewide shortfall of FMAP funds would be wide-ranging. As one example, when parents lack access to healthcare through programs like Medicaid, children suffer from reduced family financial security, compromised caregiver support, and increased stress. Ctr. on Budget & Policy Priorities, *Taking Away Medicaid for Not Meeting Work Requirements Harms Children* 2 (2019).

### *B. Equitable Economic Development Necessitates an Accurate Census Count.*

Census data is essential for calculating and allocating public dollars for economic development and job training. These programs and grants often

disburse resources based on population counts and needs-based criteria that are recorded by the census. Any undercount will thus mask measurable indicia of development and job training needs, hamstringing jurisdictions that apply for funding to benefit their residents. Inevitably, this harms the wellbeing of children, particularly those from immigrant communities of color. Parents with low-income jobs are less likely to have health benefits, and their children often lack access to necessary care. Carolyn J. Heinrich, *Parent's Employment and Children's Wellbeing*, Future Child., Spring 2014, at 121, 121–32. Conversely, pay increases for parents have been linked with higher child educational attainment and reduced likelihood of involvement in the criminal legal system. Randall K.Q. Akee et al., *Parents' Incomes and Children's Outcomes: A Quasi-Experiment*, Am. Econ. J. Applied Econ., Jan. 2010, at 86, 90.

An undercount resulting from the inclusion of a citizenship question will make it more difficult for immigrant communities of color to obtain Community Development Block Grants ("CDBGs"), which are federal disbursements established to help stimulate local job growth and economic opportunity. CDBGs rely upon specific population thresholds to determine funding amounts for grants allotted to benefit low- to moderate- income communities. Leadership Conference Educ. Fund, *Counting for Dollars: Why It Matters* 1 (2018). CDBG funding is used by economically-distressed jurisdictions to both retain and expand upon existing businesses and infrastructure. Through such retention and expansion, these grants help meet the needs of local communities. Currently, over 1,200 city and county

governments benefit from the CDBG program. Nat'l Ass'n of Ctys., *2019 Policy Brief: Support Local Development and Infrastructure Projects Through the Community Development Block Grant (CDBG) Program* 1 (2019). The composition of those 1,200 municipal governments would likely change as a result of an undercount, particularly hurting states with significant immigrant populations currently in receipt of CDBG support.[3]

Like CDBGs, the Community Development Financial Institutions Fund ("CDFI Fund")—a federal and private sector hybrid program that injects money into distressed communities for development purposes—uses census data to determine eligibility. To be CDFI Fund-eligible, a community not wholly within an Empowerment Zone or Enterprise Community must have a poverty rate of at least 20%, unemployment at 1.5 times the national average, or, for metropolitan areas, a median family income ("MFI") at or below 80% of the greater of either the metropolitan or national metropolitan MFI, as calculated using the census. Cmty. Dev. Fin. Insts. (CDFI) Fund, *CDFI Fund Information Mapping System 3 (CIMS3): User Instruction Manual* 20–21 (2017). Statistically, the percentage of unemployed Black and Hispanic adults is higher than the national average, and over 50% of families with low-income employment are Black or Hispanic. U.S. Bureau of Labor Statistics, Report 1076, *Labor Force Characteristics by Race and Ethnicity, 2017*, at 1

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[3] For example, in 2018 alone, California and Texas received 484 new grants. *See HUD Awards and Allocations*, HUD Exchange, https://www.hudexchange.info/grantees/allocations-awards/ (last visited Mar. 24, 2019).

(2018); Margaret C. Simms et al., *Racial and Ethnic Disparities Among Low-Income Families* 1 (2009).

An undercount could prove devastating to current beneficiaries of CDFI Fund investment, such as the many small businesses and healthy food financing initiatives that stand to lose loans, grants, equity investments, deposits, and credit union shares. *See CDFI Program*, U.S. Dep't of Treasury (last visited Mar. 24, 2019) (noting the ways in which financial assistance awards are made). Additionally, diminishment of CDFI Fund-eligible jurisdictions may deprive communities in need of the benefits of the Bank Enterprise Award ("BEA") Program, which provides fiscal disbursements to FDIC-insured institutions such as banks that have increased CDFI Fund lending and investing. *Bank Enterprise Award Program*, U.S. Dep't of Treasury (last visited Mar. 24, 2019). Within the last three years, BEA awardees increased their investments in CDFIs by $126.2 million. *Id.* Disruptions to both the CDFI Fund and the BEA programs will cause economic hardship to immigrant communities of color, harming an already economically disadvantaged population.

Another source for community and job development investment that will be impacted by the citizenship question is the Workforce Innovation and Opportunity Act ("WIOA"). The WIOA's purpose is to help individuals get jobs, job training, and support services in the labor market. WIOA does this by giving formula grants to states and by providing Department of Labor adult and youth education and literacy programs. In fiscal year 2018, the federal government distributed over $2.75 billion nationally through

WIOA grants and programming. Kermit Kaleba et al., *FY 2018 Omnibus Released, Increases Funding for Key Workforce, Education Programs*, Nat'l Skills Coalition (Mar. 22, 2018). This funding was divided into three equal amounts, with each allotment disbursed according to need based on relative measurements of unemployment across all fifty states. 29 U.S.C. § 3172(b)(1)(B)(ii)(I)–(III) (2015). All of these statutorily-required comparisons between states rely on census data. Chilled response rates will inevitably reshape the current disbursement map, moving funding away from communities with large immigrant populations of color.

This represents just a small snapshot of the critical programs for development and job training that will be disrupted and diminished by a citizenship question on the census. The holistic harm that an undercount will inflict on programs for communities in need will make it harder for low- and middle-income parents to provide for their children's health, education, and happiness.

### *C. An Undercount Will Inhibit Adequate Transportation and Infrastructure Investment.*

The ease and regularity with which people commute is vitally important to the wellbeing and development of children. Impediments to efficient and affordable transit circumscribe choices of schools, friends, consumables, and services. For parents, it influences what jobs are attainable as well as access to or the quality of familial healthcare coverage. *See* Todd Litman, *Evaluating Public Transportation*

*Health Benefits* 15 (2018) (describing how improved public transport increases access to essential services). Federal funding designated for transportation and infrastructure is allocated to states using census data. Thus, an undercount will hurt immigrant communities of color that are in particular need of essential improvements to the systems that dictate the flow of everyday life.

The U.S. Department of Transportation ("DOT") relies on census data to determine program effectiveness and areas of need. The census aggregates information on traffic patterns, origin-destination data for work trips, household and worker characteristics for use in travel forecasting models, worker disability and mobility limitations, and public transit use. The Nat'l Acads. Press, *Modernizing the U.S. Census* app. g at 301–02 (Barry Edmonston & Charles Schultze eds., 1995). This information is then used by the DOT to allocate federal funding to the states. In fiscal year 2015, roughly $5.5 billion of Federal Transit Formula Grants were issued based on determinations of need informed by census data. Marisa Hotchkiss & Jessica Phelan, U.S. Census Bureau, *Uses of Census Bureau Data in Federal Funds Distribution* 4 (2017). An additional $1.5 billion was apportioned for Federal Transit Capital Invest Grants and $125 million for Federal Transit Metropolitan Grants. *Id.* at 4–5. For administrative expenses related to highway maintenance in 2019, the Secretary of Transportation has approximately $475 million to distribute to states and is statutorily obligated to do so by incorporating population data from the states collected by the census. 23 U.S.C. § 104 (2018).

The U.S. Department of Housing and Urban Development ("HUD") also uses census data to disburse federal dollars for transit development through the CDBG. HUD typically grants one-third of its CDBG funding to infrastructure projects and cites transit improvement within its list of most frequently funded activities. *The Community Development Block Grant (CDBG) Program–Frequently Asked Questions*, U.S. Dep't Hous. & Urb. Dev., https://www.hudexchange.info/onecpd/assets/File/The-Community-Development-Block-Grant-FAQ.pdf (last visited Mar. 24, 2019). CDBGs are administered based upon community need, which can only be calculated for transportation purposes using data—such as population size and transit and traffic patterns—measured by the census. As of fiscal year 2018, CDBGs designated for transportation investment and development impacted over 750,000 people within targeted communities, while improvements to sidewalks and streets impacted nearly ten million people. U.S. Dep't of Hous. & Urban Dev., *CDBG National Accomplishment Report: FY 2005—FY 2018* (2018). An undercount will push communities, particularly those with large immigrant populations of color, below the population thresholds required for CDBG eligibility even though their true populations would exceed those cutoffs, thus unfairly denying them much needed CDBG funding.

Transportation and infrastructure funding comprise a significant portion of federally-allotted money to states and municipalities, and disbursers rely on census data to determine the recipients. Effective funding in this area will foster greater

economic and employment development in distressed communities and will make more schools, friends, consumables, and services reachable by people from dispersed populations. Conversely, undercounts will lead to poorly-targeted investment, which will inherently limit opportunities and add difficulty to the daily lives of children and their parents as they struggle, or are unable, to get from one location to the next.

## IV. Including a Citizenship Question Will Cause Children of Color to Suffer Stigmatic and Dignitary Harms.

The citizenship question enshrines the legal and social inferiority of immigrant communities of color.[4] With respect to students of color, it will cause long-lasting stigmatic harm that not only damages students' self-worth, but also injures their academic prospects. Additionally, the citizenship question will stoke fear, anxiety, and stress within undocumented communities and households of mixed legal status, creating instability that will impede students' ability to benefit from both their education and extracurricular life. Communities with high numbers of undocumented residents are already economically and politically marginalized. *See, e.g.*, Cecilia Menjívar & Andrea Gómez Cervantes, *The Effects of Parental Undocumented Status on Families and Children*, Am. Psychol. Ass'n (Nov. 2016). These dignitary and material harms caused by the

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[4] For example, sociologists have found that in the immigration context, "legal status" has become a proxy for race and racial discrimination. *See, e.g.*, Cecilia Menjívar et al., *Immigrant Families* 45 (2016).

citizenship question will further devastate an already at-risk population living on the margins of our society.

Inclusion of the citizenship question is a clear statement that this administration believes that non-citizens are inferior. By attempting to discourage participation in the census, the citizenship question tells immigrant communities of color that they do not count and excludes them from participation in civic life. This Court has a regrettable history of giving moral and legal authority to stereotypes about the inferiority of certain classes, such as non-citizens and people of color. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 218–19 (1944); *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896); *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857). Historically, these decisions have demonstrated that dignitary harms, such as a presumption of inferiority, are intimately connected to political and social subordination. Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. Pa. J. Const. L. 669, 687–95 (2005). If this Court upholds the Department of Commerce's attempt to include the citizenship question on the 2020 census, it will enshrine the presumption that non-citizens are inferior, inflicting severe dignitary harm on immigrant communities of color.

Presumptions of inferiority have been incorporated into the law to harm unpopular groups throughout our nation's history. For example, the enslavement of Black people was rooted in the view that they were "beings of an inferior order, and altogether unfit to associate with the white race," and

this Court relied on that rationale to deny Black people their humanity and citizenship. *Dred Scott*, 60 U.S. (19 How.) at 407. Similarly, in upholding the Chinese Exclusion Act of 1882, this Court relied on stereotypes about "vast hordes" of Chinese immigrants "who will not assimilate," codifying the supposed inferiority of Chinese people into the law. *Chae Chan Ping*, 130 U.S. at 606.

While the citizenship question does not inflict the same degree of harm as *Dred Scott* or *Chae Chan Ping*, it nevertheless singles out immigrant communities and excludes them from civic life, thus signaling that they are inferior. If this Court approves the anti-immigrant sentiments embedded in the citizenship question, it imbues these dangerous messages about the inferiority of immigrants with the gloss of moral and legal authority. Instead, the Court should find that legal status is not an appropriate reason to single out students for inferior treatment. *Cf. Plyler v. Doe*, 457 U.S. 202, 219–220 (1982) (declining to create an "underclass" of undocumented children for the purpose of denying them education).

The citizenship question communicates to children from immigrant communities of color that they are inferior. This will harm students' mental health and can contribute to depression, anxiety, and stress. *See* Samuel Noh & Violet Kaspar, *Perceived Discrimination and Depression: Moderating Effects of Coping, Acculturation, and Ethnic Support*, 93 Am. J. Pub. Health 232, 235 (2003) (finding significant direct links between perceived discrimination and depression in immigrant communities); Carola Suarez-Orozco et al., *Undocumented Undergraduates*

*on College Campuses*, 85 Harv. Educ. Rev. 427, 431, 443 (2015) (establishing that anxiety and depression rates of undocumented students are highly elevated relative to the rest of the population). Such notions can also damage students' general happiness, performance at school, and long-term success. *See* Hirokazu Yoshikawa et al., *Unauthorized Status and Youth Development in the United States: Consensus Statement of the Society for Research on Adolescence*, 27 J. Res. on Adolescence 4, 5 (2016) ("[Y]oung adults with unauthorized status, relative to their authorized peers, demonstrate less positive educational, economic, and mental health outcomes, even after adjusting for indicators of ethnicity and socioeconomic status.").

Further, the addition of a citizenship question will foment fear, anxiety, and stress within immigrant communities of color because it will cause children to worry that they, their family members, or their neighbors are at risk of deportation. Parents' anxiety about their legal status is often transmitted to their children through both words and actions, impacting their children's wellbeing. Hirokazu Yoshikawa, *Immigrants Raising Citizens: Undocumented Parents and Their Young Children* 2 (2011). As noted in the administrative record, the Trump administration's anti-immigrant rhetoric and increased immigration enforcement has already created an aversion to the federal government and a climate of fear among immigrant communities, which the citizenship question will compound. *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 541 (S.D.N.Y. 2019). In focus group interviews, the Census Bureau found that immigrant respondents appeared anxious

and reluctant to cooperate with interviewers—so much so that respondents have walked out of interviews when the question of citizenship came up. Memorandum from the Ctr. for Survey Measurement to the Assoc. Directorate for Research & Methodology 4–5 (Sept. 20, 2017), https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf. Fear caused by the citizenship question will be passed along to children within the home.

Increased fear and stress at home will impair students' performance at school. *See, e.g.*, Lisa Flook & Andrew J. Fuligni, *Family and School Spillover in Adolescents' Daily Lives*, 79 Child Dev. 776, 784 (2008) (finding that family stress predicts problems with attendance and learning at school). A 2017 study conducted by the UCLA Civil Rights Project found that the Trump administration's anti-immigrant rhetoric has already had a deleterious impact on immigrant children's performance in schools. The study revealed that 63.9% of teachers reported that their students were concerned with how immigration issues would affect them, their families, or people they knew. Patricia Gándara & Jongyeon Ee, UCLA Civil Rights Project, *U.S. Immigration Enforcement Policy and Its Impact on Teaching and Learning in the Nation's Schools* 6 (2018). Nearly 76% of respondents indicated that concerns about immigration enforcement had caused students to suffer behavioral or emotional problems in the classroom, including "crying, refusing to speak, being distracted, and acting anxious or depressed." *Id.* at 9. Many teachers also observed stark changes in high-performing students in particular, noting decreased participation, visible

disconnect and disinterest, and a lack of desire to apply to college amongst previously ambitious students. *Id.* at 10.

In addition to impairing student behavior within the classroom, the citizenship question will cause some students to withdraw from school altogether. School absenteeism amongst immigrant children has increased over the past few years. *Id.* at 13 (finding that 68% of school administrators noticed an increase in absenteeism during the Trump presidency related to concerns about immigration enforcement amongst their students).[5] With the weight of the citizenship question hanging over their heads, students and families may retreat from public life, including school, in an effort to avoid what they perceive to be a site of government authority and potential exposure to immigration consequences.

Finally, fear and anxiety created by the citizenship question may cause students and their families to disengage from extracurricular activities and other pro-social programming. Extracurricular participation is positively related to feelings of school attachment and belonging. *See* Randall Brown & William P. Evans, *Extracurricular Activity and Ethnicity: Creating Greater School Connection Among*

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[5] For example, in February 2017, public schools in Las Cruces, New Mexico saw a 60% spike in truancy in the days following an ICE raid on a local trailer park. Jonathan Blitzer, *After an Immigration Raid, a City's Students Vanish*, New Yorker (Mar. 23, 2017). In April 2018, over five hundred immigrant children in Tennessee missed school the day after ICE raided a meatpacking plant in the area. Catherine E. Shoichet, *ICE Raided a Meatpacking Plant. More than 500 Kids Missed School the Next Day*, CNN (Apr. 12, 2018, 7:01 AM).

*Diverse Student Populations*, 37 Urb. Educ. 41, 53–54 (2002) (finding that students of all backgrounds benefit from extracurricular activities). Students who participate in extracurricular activities are more likely to engage in academic and social behavior that is predictive of school engagement and graduation. Jeremy D. Finn, *Withdrawing from School*, 59 Rev. Educ. Res. 117, 128–29 (1989). Youth facing stigmatization often withdraw from social networks in response to feelings of discomfort. Yoshikawa et al., *supra*, at 9–10. With the introduction of a citizenship question, we should expect that children and students fearing immigration consequences and the stigmatization of being branded as "other" will retreat from their extracurricular social networks.

## CONCLUSION

For the foregoing reasons, the Southern District of New York's judgment vacating Secretary Ross's decision to add a citizenship question to the 2020 census questionnaire and enjoining petitioners from implementing Secretary Ross's decision should be affirmed.

Respectfully Submitted,

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